Supreme Court, U. S.
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No. 80-706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDUSTRIAL TILE, INC., a corporation,
Petitioner,

versus

JOHN STEWART AND UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Alabama

RESPONDENT JOHN STEWART'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a state court's ruling regarding the admissibility of evidence of a violation of an OSHA regulation subject to review by the United States Supreme Court?

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INDUSTRIAL TILE, INC., a corporation
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RESPONDENT JOHN STEWART'S BRIEF IN OPPOSITION

OPINION BELOW

Respondent adopts Petitioner's response in this regard.

JURISDICTION

This Court lacks jurisdiction of Petitioner's writ of certiorari.

STATUTES INVOLVED

Respondent adopts Petitioner's response in this regard.

STATEMENT OF THE CASE

Respondent adopts Petitioner's response in this regard.

REASONS FOR DENYING THE WRIT

The question presented by Petitioner in the instant proceeding does not warrant review by this Court; the issues are not of sufficient import to merit this Court's attention. The Alabama Supreme Court carefully considered the issues raised by Petitioner herein and decided them correctly, applying basic principles of Alabama evidentiary law. Furthermore, Petitioner does not present a federal question as required by 28 U.S.C. §1257(3). In any event, Petitioner is precluded from raising a federal question at this juncture since it was not raised in any prior proceedings. Petitioner, following denials for a stay of the judgment by the Alabama Supreme Court and this Court, now improvidently requests that this Court review evidentiary rulings made pursuant to long-established Alabama precedent.

The initial defect in Petitioner's position is the lack of a federal question. The issue presented by Petitioner may be summarized quite succinctly as follows: Does a state court's ruling regarding the admissibility of evidence of a violation of an OSHA regulation present a federal question? Petitioner cites no authority in support of an affirmative answer to this question; none exists.

Assuming *arguendo* that the lower court's evidentiary ruling presents a federal question as defined in 28 U.S.C. §1257(3), Petitioner is precluded from raising it for the first time in a petition for certiorari. Petitioner has not heretofore cast his evidentiary objections in the cloak of a federal question; he may not now do so. Petitioner's objection to questions regarding its violation of an OSHA regulation was founded on the premise that such evidence was "inadmissible, incompetent, irrelevant [and] immaterial . . . [and] prejudicial . . . ." At no previous time has Petitioner asserted that the lower court's evidentiary ruling presented a federal question; accordingly, Petitioner's belated attempt to create a federal question in order to comply with the statutory requirements for certiorari is inappropriate. *See, e.g., Wilson v. Cook*, 327 U.S. 474 (1946); *Whitney v. People of State of California*, 274 U.S. 357 (1927).

Petitioner urges that the language of 29 U.S.C. §653(b)(4) precludes a state court from hearing evidence of OSHA violations. The statutory provision in question provides as follows:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. OSHA §4(b)(4), 29 U.S.C. §653(b)(4) (1970).

Petitioner states in Brief that the Alabama Supreme Court's consideration of the OSHA violation (and subsequent payment of the fine by Industrial Tile without contest) violates section 653(b)(4) since the admissibility of such evidence " 'affect[s]' the 'common law' or 'liabilities' of employers and employees". Petitioner's Brief for Certiorari at 6. An examination of pertinent case law indicates that this section simply means that no independent cause of action is created under OSHA.

Since the passage of OSHA in 1970, numerous plaintiffs have maintained that OSHA creates a federal cause of action for an injured party. The courts, apparently uniformly rejecting this argument, have consistently relied on section 653(b)(4) to opine that Congress did not intend to create a new remedy. As the Fifth Circuit noted in *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975):

> The only provision in the statute which addresses itself to a private remedy clearly indi-

> cates that Congress did not intend OSHA to create a new action for damages in favor of employers. Section 653(b)(4) provides that . . . [statutory language omitted]. It seems clear that Congress did not intend OSHA to create a new private cause of action, but, on the contrary, intended private rights to be unaffected thereby.

Id. at 976-77. *See Russell v. Bartley*, 494 F.2d 344 (6th Cir. 1974) (a private civil remedy is precluded by the express terms of section 653(b)(4)); *Skidmore v. Travelers Insurance Co.*, 483 F.2d 67 (1973); *Fawvor v. Texaco, Inc.*, 387 F.Supp. 626 (E.D. Tex. 1975), *rev'd on other grounds*, 546 F.2d 636 (5th Cir. 1977) (section 653(b)(4) operates as a "statutory roadblock" to plaintiffs asserting that OSHA creates a federal cause of action); *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F.Supp. 913 (E.D. La. 1977); Comment, *OSHA and the Private Litigant*, 30 Ala. L. Rev. 20 (1978) ("Federal courts have had several occasions to consider the implication of a private cause of action from OSHA . . . . The determinative provision of the Act in all these OSHA cases has been section 4(b)(4)").

Although the preceding discussion is by no means exhaustive, it adequately illustrates that Petitioner's reliance on section 653(4)(b)(4) is inappropriate. The suggestion that this section in some way limits the evidence that a court may consider in negligence actions is groundless. Furthermore, if OSHA does not vest inde-

pendent jurisdiction in the federal courts under 28 U.S.C. §1331, the use of OSHA regulations as evidence does not constitute a federal question.

It is widely accepted that both OSHA standards and evidence that they have been violated are admissible; courts have considered such evidence to be relevant in establishing a reasonable standard of care. The evidentiary use of OSHA violations has been approved by both courts and commentators. In approving this evidentiary use of OSHA, the courts have drawn a distinction between the creation of a private remedy under OSHA and the admissibility of OSHA regulations; petitioner does not recognize this distinction in Brief. The restrictions contained in the Act that arguably prohibit the creation of a cause of action do not operate to exclude evidence of OSHA violations. As one commentator has noted:

> If OSHA standards were introduced as evidence of negligence it should not violate the prohibition against the extension of rights or liabilities of parties affected by the Act. In other words, this approach is not contrary to the intent of section 4(b)(4) . . . . The jury is asked only to *consider* the regulation in reaching its conclusion.

Comment, *supra*, at 43-4. *See also* Hollis & Howell, *The Occupational Safety and Health Act: Potential Civil Remedies*, 10 Forum 999, 1013 (1975).

The courts have agreed with the reasoning above and have generally allowed evidence of OSHA violations. As the court noted in *Buhler v. Marriott Hotels, Inc.*, 390 F.Supp. 999 (E.D. La. 1974):

> The plaintiff may, of course, use OSHA standards and evidence that they have been violated as evidence of negligence at trial, to the extent they would be admissible for that purpose under the rules of evidence. . . .

Id. at 1000. *See Davis v. Portland General Electric Co.*, 286 Or. 195, 593 P.2d 1135 (1979); *Kelley v. Howard S. Wright Construction Co.*, 90 Wash.2d 323, 582 P.2d 500 (1978); *Koll v. Manatt's Transportation Co.*, 253 N.W.2d 265 (Ia. 1977); *Disabatino Brothers, Inc. v. Baio*, 366 A.2d 508 (Del. 1976); *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976).

None of the cases cited by Petitioner in Brief at page 12 hold that the admissibility of OSHA violations enlarges the substantive law of a state.[1] At least two of the cases cited by Petitioner hold that evidence of the

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1 One of the cases cited by Petitioner, *Otto v. Specialties, Inc.*, 386 F.Supp. 1240 (N.D. Miss. 1974) is apparently the only case that has held OSHA regulations inadmissible. An examination of the Mississippi decision indicates that the court inappropriately juxtoposed negligence per se principles to questions regarding the evidentiary use of OSHA. As one commentator has noted, "In that decision . . . the court not only confused negligence per se principles with the subject matter of other OSHA cases, it also failed to recognize any distinction between negligence per se and the evidentiary use of OSHA regulations." Comment, *supra*, at 42.

violation of OSHA regulations constitutes negligence per se. The Iowa Supreme Court ruled in 1977 that a "violation by an employer of an OSHA or IOSHA standard [the comparable state statute] is *negligence per se* as to his employee. Such a violation is *evidence of negligence* as to all persons who are likely to be exposed to injury as a result of the violation." *Koll v. Manatt's Transportation Co.*, 253 N.W.2d 265, 270 (Ia. 1977). A similar result was reached in the *Kelley* case. The Washington Supreme Court, initially noting that OSHA regulations are relevant to the appropriate standard of care, held that "violation of the regulation would be negligence per se." 90 Wash.2d 323, ____, 582 P.2d 500, 508.

The Alabama Supreme Court has also expressly held that evidence of OSHA violations is admissible to establish the proper standard of care in a negligence case. In *Knight v. Burns, Kirkley & Williams Construction Co.*, 331 So.2d 651 (Ala. 1976), the Alabama Supreme Court ruled that while OSHA does not create a private cause of action, "this does not mean that appropriate and relevant standards and safety requirements established by OSHA or accompanying regulations are completely and totally irrelevant." *Id.* at 654. The Alabama court relied on a long-established state evidentiary law in reaching its conclusion in *Knight*.

The Alabama Supreme Court ruled in 1857 that medical treatises are admissible in evidence under certain circumstances. The court in *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857), noted the following:

> We think that medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence. Should such works be obscure to the uninitiated, or should they contain technicalities, or phrases not understood by the common public, proper explanation should be offered, lest the jury be thereby misled.

Id. at 567.

As noted in the excerpt above, the court in *Stoudenmeier* provided a means by which the admissibility of such evidence could be controlled and limited.

In *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939), the Alabama Supreme Court, analogizing the evidentiary nature of medical treatises to safety codes, ruled that safety codes are admissible in Alabama. Acknowledging the nature of the rule announced in *Stoudenmeier*, the court in *Hardy* concluded that "[w]e have not found the ends of justice defeated by our rule, nor the difficulties of its applications very great." *Id.* at 266-67. Furthermore, the court in *Hardy* reiterated the limitations placed upon the admissibility of this type of evidence and concluded that the safety codes were properly admitted.

In the instant case the Alabama Supreme Court considered its prior holdings in *Hardy* and *Knight* and ruled in the following manner:

> If the regulations are admissible as going to show a standard of care, then it seems only reasonable that evidence of violation of the standards would also be admissible as evidence that the defendant failed to meet the standards that it should have followed. Clearly, the fact that Industrial Tile had been cited by OSHA for violating the standards, and the fact that Industrial Tile has paid the fine, are relevant to the question of whether it violated the standard of care applicable to its conduct.

Industrial Tile, Inc. v. John Stewart and United States Fidelity and Guaranty Co., 388 So.2d 171 (Ala. 1980).

Furthermore, the court below, as required by *Stoudenmeier* and its progeny, insured that the jury understood the impact of the evidence. The record indicates that the court instructed the jury as follows:

> [The evidence regarding the regulations is admissible] not as the absolute rule for you to follow but this is a guideline of rules and regulations, one of the guidelines of the rules and regulations to be followed in the trade or business Industrial Tile is involved in.
>
> [T]his is not the ultimate decision for you to decide, but you consider this with all of the facts that you hear in this case.

Id. at 173.

It is clear that the Alabama Supreme Court did no more than apply a well-tested and long-established principle of Alabama law in determining that the evidence was properly admitted.[2] As noted by the court, there was no error to reverse, "particularly in light of the admonition given the jury by the trial judge that it was not to consider the rules and regulations as an absolute, but merely as guidelines and that they were to be considered along with all the other facts addressed in the case." *Id.* at 174.

A review of the court record indicates that Industrial Tile was in no way prejudiced by the admission of the evidence in question. Petitioner notes in Brief that "[if] the decision . . . is allowed to stand then the inevitable result will require employers to contest every citation or fine rather than expose itself to large personal injury judgments such as has been experienced in this case."

Notwithstanding the fact that the court did not rely exclusively on the OSHA regulations to establish In-

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2 Petitioner attaches unwarranted emphasis to the fact that the evidence was admitted by the court below as a "declaration against interest." Whether the evidence is properly viewed as such and whether the *Motley* and *Ritter* cases operate as authority in this situation is inconsequential at this juncture. The record clearly reflects that the Alabama Supreme Court admitted the evidence under long-standing authority because it was relevant to the issue before the court.

dustrial Tile's negligence,[3] Petitioner's position is simply not borne out by the record. The officer of Industrial Tile who testified concerning the OSHA violation, Mr. Savell, was given ample opportunity to explain the circumstances surrounding the citation issued against Industrial Tile. The following excerpt from the transcript is instructive in this regard:

> Q Now, Mr. Savell, OSHA people cited Industrial Tile the day of this accident for violation of the 10-foot rule, isn't that correct?
>
> MR. SMITH: Your Honor, I would like to renew my objection to this question of counsel on the grounds that it is inadmissible, incompetent, irrelevant and immaterial as to any of these matters that OSHA undertook in administrative proceedings, would be prejudicial and again renew our request for a mistrial.
>
> THE COURT: Overruled. Overruled and denied. Now, ladies and gentlemen of the jury, I'm allowing him to ask this question, but I would tell you that this is not the ultimate decision for you to decide, but you consider this in connection with all the facts that you hear in this case. Okay. You may answer.

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3 The record clearly indicates that the OSHA violation was not the only evidence of Industrial Tile's negligence; the court notes that "[t]here was evidence from a number of witnesses that the crane violated the ten-foot standard." 388 So.2d at 174.

A They did fine us. The officer told me it was an automatic fine, that any time a man was involved in such as . . .

Q And wasn't that concerning this very paragraph 1926.550(a) . . .?

THE COURT: If you know.

Q . . . 15(i)?

MR. SMITH: We would like a continuing objection and renew our motion on each question asked by counsel along this line.

THE COURT: You have it.

Q Isn't that the very paragraph that calls for a 10-foot clearance?

A Which one is it now?

Q Paragraph 1926.550(a) 15(i)?

A If this was under that particular . . . (inaudible)

Q Industrial Tile was given notification of that, isn't that correct, or that proposed fine?

A That's correct.

Q An opportunity to contest that citation or fine? Isn't that correct?

A I think we had an opportunity to contest it, but . . .

Q Did Industrial . . . ?

MR. SMITH: Let him finish his answer.

Q I'm sorry, go ahead.

A We didn't contest it for the reason that I didn't think it would even do any good, it would be a waste of time.

Q Didn't even write a letter?

A There wasn't much sense to it because I felt like it would be a waste of time. He said it was an automatic fine, anyway. We did rig it to go lower.

MR. SMITH: I didn't hear the last statement.

THE COURT: We did rig it to go lower.

MR. ATCHISON: Did rig it to go lower?

A Yes, it was.

The preceding dialogue illustrates that Industrial Tile's position was in no way compromised by allowing evidence that Industrial Tile had paid the fine without contesting it. The "inevitable result" hypothesized by Petitioner is not supported by the record in the instant case. The only "inevitable result" under Petitioner's method of analysis is that whenever a court makes an evidentiary ruling regarding a federal law, that ruling will be subject to review by the United States Supreme Court. Such a result is neither appropriate nor desired.

CONCLUSION

Petitioner's writ is appropriately denied for the following reasons:

(1) Petitioner does not present a federal question as required by 28 U.S.C. §1257(3);

(2) Petitioner's attempt to raise a federal question at this juncture is untimely and therefore precluded;

(3) Petitioner requests that this Court do no more than review an evidentiary ruling made by the Alabama Supreme Court in accordance with a long line of precedential authority;

(4) Petitioner's position at trial was in no way compromised by the admissibility of the OSHA violations; and,

(5) The conclusion reached by the court below was proper in all respects and, furthermore, was fair to the respective parties.

WHEREFORE, Respondent respectfully requests that Petitioner's writ of certiorari be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief of Respondent, John Stewart in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama, by depositing same, postage prepaid, in the U.S. mails, addressed to:

James Atchison
P.O. Box 1706
Mobile, AL 36601

I further certify that all parties required to be served, have been served.

This ____ day of December, 1980.

JAMES H. LACKEY